SUPREME COURT, U. S.

No. 778

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In the

Supreme Court of the United States

OCTOBER TERM, 1965

NATURAL RESOURCES, INC., and A. K. WILSON,
Petitioners,

vs.

WILLIAM J. WINEBERG,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on August 2, 1965.

OPINIONS BELOW

The opinion of the District Court on the segregated issue of title (R Vol I, pp 57, 69), Appendix A hereto, infra, page 15, is reported at 194 F Supp 12. The District Court's unreported Memorandum For Judgment (R Vol I, p 83), following trial of the damage issue, is

printed in Appendix B hereto, infra, page 28. The District Court's Memorandum And Order denying petitioners' motion for new trial (R Vol I, p 130), printed in Appendix C hereto, infra, page 33, is not reported. The opinion of the Court of Appeals (R Vol I, p 187), printed in Appendix D hereto, infra, page 36, is reported at 349 F2d 685.

JURISDICTION

The judgment of the Court of Appeals was entered on August 2, 1965 (R Vol I, p 197; page 45 infra). Rehearing was denied on September 8, 1965 (R Vol I, p 198). This Court has jurisdiction under 28 USC § 1254 (1).

The District Court had jurisdiction under 28 USC § 1332(a)(1). The Court of Appeals had jurisdiction under 28 USC § 1291.

QUESTIONS PRESENTED

1. Whether petitioners' charge that the Trial Judge improperly attended the horse races with respondent during the trial was correctly disposed of on appeal by indulging in a presumption of judicial innocence and propriety, when the Trial Judge not only failed to deny the charge of judicial misconduct but expressly assumed it to be true.

2. Whether the Trial Court's delay of more than

four years in deciding the segregated issue of title constituted such a departure from the accepted and usual course of judicial proceedings as to require a new trial, either as a prejudicial abuse of the Trial Court's discretion or as a necessary exercise of appellate supervisory jurisdiction.

3. Whether Rule 52(a) of the Federal Rules of Civil Procedure provides an applicable standard of review of findings made and entered more than four years after the trial, when questions of credibility could no longer be resolved, and a legal presumption of judicial propriety has been employed to resolve a charge of serious judicial misconduct.

RULES INVOLVED

This petition involves Rule 52(a) Federal Rules of Civil Procedure which is printed in Appendix E hereto, infra, page 47.

STATEMENT OF THE CASE

Jurisdiction in the District Court

Respondent's complaint to quiet title to real property and for damages for timber trespass was filed on August 25, 1955 (R Vol I, p 1). Jurisdiction in the District Court was predicated upon diversity of citizenship under 28 USC § 1332(a)(1), respondent being a citizen of Washington, petitioners and other defendants resi-

dents of California, Colorado, Nevada and Oregon and the amount in controversy, exclusive of costs and interest, being in excess of $3,000.

Proceedings in the District Court

The issue of title was segregated and tried to the Court intermittently between October 9 and December 3, 1956.[1] It was ordered submitted on January 4, 1957 (R Vol I, pp 173-174). The Court's decision was not rendered until May 1, 1961, four years, three months and 28 days later (R Vol I, p 57). A second trial on the issue of damages culminated in a decree and judgment against petitioners in the amount of $41,391.76 which was entered on August 16, 1962 (R Vol 1, pp 87, 97).

Petitioners filed a timely motion for new trial (R Vol I, p 104) asserting, *inter alia*, misconduct on the part of the Trial Court and respondent. This charge was supported by the affidavit of Elwood G. Buffum (R Vol I, p 112), one of respondent's witnesses, stating that during an afternoon recess in the first trial, while in the company of respondent's attorney, the affiant personally observed the Trial Judge and respondent at a race track in South San Francisco, sitting together in adja-

1. Petitioner Natural Resources, Inc. purchased the property (880 acres of timberland in a wilderness area of Humboldt County, California) in April, 1951 and recorded its deed the following May. Respondent claims title under a prior unrecorded deed executed on May 20, 1948. Petitioners claimed that respondent never purchased the property and at best, the 1948 deed was a mortgage to secure a loan. Natural Resources also claimed superior title as a good faith purchaser under the California recording statute. Cal Civil Code § 1214. Defenses of estoppel and laches were also asserted.

cent box seats. The Buffum affidavit further alleges that the Trial Judge and respondent remained together and engaged in continuous conversation throughout the afternoon, until the horse races were concluded.

Respondent's attorney, Mr. Norman L. Easley, prepared and filed a counter affidavit (R Vol I, p 120) stating, in substance, that during the trial he attended a racing event with respondent, that he saw the Trial Judge at a distance, but that neither he nor respondent spoke to him. He denied ever attending the races with Mr. Buffum.[2]

At the hearing on petitioners' motion for new trial, the Trial Judge stated that he could not recall whether he had attended the horse races with plaintiff or not: "I don't say it did or didn't occur" (R Vol II, pp 27-29).[3] Seventeen months later the Trial Judge issued a Memorandum and Order denying petitioners' motion (R Vol I, p 130). He expressly assumed that the incident had occurred but ruled that his attending the horse races with respondent "is not evidence of bias, and certainly no ground for granting a new trial" (R Vol I, p 131).

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2. Mr. Easley resigned as counsel for respondent after commencement of the appeal to the Court of Appeals (R Vol I, p 166).

3. At the hearing the Trial Judge stated that he did not feel that the charge was of "sufficient quality or dignity to indicate the necessary prejudice" to support a motion for new trial (R Vol II, p 13).

Proceedings in the Court of Appeals

On appeal, petitioners sought a reversal on grounds (among others not pertinent here) that the Trial Judge was guilty of prejudicial misconduct in attending the horse races with respondent during the trial, and that in failing to render a decision upon the issue of title for more than four years after that matter was heard and submitted he had abrogated and abused his judicial function.

In reviewing the first charge of judicial misconduct, the Court of Appeals (R Vol I, pp 194-195) did not take into consideration the Trial Judge's failure to deny the charge that he had attended the horse races with respondent or his express assumption (R Vol I, p 131) that he had done so. The Court limited its review to the Buffum (R Vol I, P 112) and Easley (R Vol I, P 120) affidavits, found them to be in direct conflict, and employed a presumption of judicial propriety to strike the balance in the Trial Judge's favor. The Court of Appeals recognized (R Vol I, P 194), as the District Court did not, that the facts charged required a new trial as a matter of law if they were true.

The Court of Appeals likewise recognized that the District Court's delay of more than four years in deciding the issue of title was "shocking" and "inexcusable" (R Vol I, pp 195-196). It dismissed this specifica-

tion of error upon findings that (a) the trial was conducted with extreme fairness to petitioners, (b) there was little real conflict in the evidence and (c) the findings on material issues are supported in most instances by the testimony of disinterested witnesses and not solely upon the self-serving statements of respondent (R Vol I, p 196). The District Court's inability to pass upon questions of credibility years after the witnesses had appeared and testified was not considered.

Notwithstanding the irregularities in the proceedings below and the recourse to a legal presumption to resolve a serious charge of judicial misconduct, the Court of Appeals invoked Rule 52(a) of the Federal Rules of Civil Procedure and declared that "the trial court's main and subsidiary findings are conclusive on this appeal, unless we can fairly conclude that they are 'clearly erroneous' * * *" (R Vol 1, p 188).

One of the central issues in the case was whether respondent had ever paid for the property in dispute. He had told sharply divergent and conflicting stories at various stages of the proceedings[4] which were in large part inconsistent with the documentary evidence sup-

4. In his deposition (Exhibit W, below), respondent testified, contrary to his subsequent trial testimony and the ultimate findings of the trial court, that the Wienert Lumber Co. transaction "has no reference", was "never entered into", was "just a contemplation" and "has nothing to do with this case whatsoever."

plied by his own books and records.[5] The question on appeal was not simply whether the Trial Court's finding that respondent had actually paid for the property was or was not clearly erroneous. The appeal raised the more basic issue of whether this and other findings were made by a fair and impartial Judge and at a time when he was still able to pass upon the crucial question of plaintiff's credibility.

REASONS FOR GRANTING THE WRIT

I

The District Court's gross departure from the accepted and usual course of judicial proceedings, sanctioned by the Court of Appeals, requires the exercise of this Court's supervisory jurisdiction.

A. The race track incident:

The Court of Appeals correctly ruled that if the Trial Judge attended the horse races with respondent during the trial, petitioners must have a new trial. It erred in dismissing this issue upon a finding that the Trial Judge probably did not do so. (R Vol I, pp 194-195)

The misconduct issue was before the Court of Appeals because the Trial Judge either would not or could not resolve the factual question raised by the conflict-

5. Respondent's documentary evidence showed that a $6,000 check, which he offered as evidence of payment (R Vol III, p 53), was written against a wholly insufficient bank balance, was never recorded by him as a deduction, and was subsequently returned to him and cancelled.

ing affidavits and considered it unnecessary to do so.[6] He elected to "stand on the implications that flow" from the Buffum allegations (R Vol II, p 29) and expressly assumed them to be true. He denied petitioners' motion for new trial only because he felt that the charges were legally insufficient (R Vol I, p 131).[7]

The Court of Appeals correctly recognized the District Court's basis of decision to be patently invalid. Having done so, it should not have proceeded to ignore the Trial Judge's express assumption that he had attended the races with respondent and sought to resolve this issue in his favor by indulging in a presumption of judicial propriety. On this state of the record, its task was to pass upon the legal sufficiency of the charge, not upon the factual question of whether the incident had occurred. Moreover, where a trial judge does not believe that misconduct is misconduct and leaves the record unexplained, the legal presumption of innocence and propriety is wholly inapplicable. See *Finlen v. Heinze*, 28 Mont 548, 73 Pac 123, 129-131 (1903); *Gay v. Torrance*, 145 Cal 144, 78 Pac 540, 542 (1904).

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6. The Trial Judge's inability to recall whether he had attended the races with respondent (R Vol II, pp 27-29) suggests only that he had done so on so many occasions that he could not recall if he had done so on the occasion in question. A judge conscious of his judicial obligations could hardly forget such a gross indiscretion. As a Federal District Judge he should have been able to positively deny that such an incident did or could have occurred. In short, the situation should not have required memory.

7. For the convenience of the Court, the relevant provisions of the Canons of Judicial Ethics, which petitioners contend undermine the trial court's basis of decision, are set forth in Appendix F hereto, infra page 48.

Disposing of a charge of judicial misconduct solely on the basis of a legal presumption (contrary to the Trial Court's assumption) cannot eradicate the appearance and suspicion that petitioners did not have a fair and impartial trial. The waters of justice have been and remain polluted.[8]

In *Berger v. United States*, 255 US 22, 41 S Ct 230, 65 L Ed 481 (1920) this Court said:

> "* * * the tribunals of the country shall not only be impartial in the controversies submitted to them, but shall give assurance that they are impartial,—free * * * from any 'bias or prejudice' that might disturb the normal course of impartial judgment. * * *" (p 35-36)

More recently in *Communist Party v. Subversive Activities Control Board*, 351 US 115, 100 L Ed 1003, 76 S Ct 663 (1955) this court said:

> "* * * The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. See McNabb v. United States, 318 US 332, 87 L ed 819, 63 S Ct 608. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted." (p 124)

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8. *Mesarosh v. United States*, 352 US 1, 1 L Ed 2d 1, 77 S Ct 1 (1956) at page 9.

This Court's power of supervision over the administration of justice in the federal courts is not restricted to criminal proceedings. It will exercise its power in any case where the mandate of "untainted administration of justice" has not been observed. *Thiel v. Southern Pacific Co.*, 328 US 217, 225, 90 L Ed 1181, 66 S Ct 984 (1945). That power should be invoked in this case to preserve the integrity of the federal judiciary and to afford petitioners the unquestionable fair and impartial trial to which they are entitled.

B. The trial court's delay:

The Trial Court's delay of four years, three months and 28 days in deciding the issue of title was inherently prejudicial and required reversal. In making a "critical survey of the whole record" and attempting to formulate therefrom certain conclusions as to the nature of the evidence and the procedural aspects of the trial (R Vol I, p 196), the Court of Appeals departed from and lost sight of the central issue involved.

The factual issues before the Trial Court were not in any major respect the product of conflicting evidence offered by the opposing parties. The central question was whether respondent's ultimate story, that he had purchased the property involved within the framework of an intricate, illegal tax avoidance scheme, was to be believed. He had previously denied, under oath, that the

tax scheme had anything to do with the case. Additionally, adoption of his final story necessarily required a conclusion that all of the pertinent entries in respondent's books and records (which conflict with the Trial Court's findings and negate his claimed purchase) were intentionally falsified and should be disregarded (supra, pp 7-8).

Resolution of the crucial question of respondent's credibility was the function and responsibility of the Trial Court. As the Court of Appeals recognized, "memory tends to dim, recollection to grow faint, and impressions to vanish, with the passage of time" (R Vol II, p 195). Four years, three months and 28 days after the case was submitted for decision, the Trial Judge's memory of respondent as a witness was necessarily nonexistent. The concept of a fair trial does not embrace a proceeding in which the Trial Court, as here, did not and could not perform one of its essential functions.

The Trial Judge's unsatisfactory and incorrect disposition of the misconduct charge and his inexcusable procrastination in deciding the issue of respondent's title barred the Court of Appeals from affirming the judgment as the product of a fair and impartial trial. Only an exercise of this Court's supervisory jurisdiction can cure the error and the resulting injustice.

II

The applicability of Rule 52(a) of the Federal Rules of Civil Procedure as an appropriate standard of review under the circumstances of this case presents a question of substantial importance to the fair and impartial administration of justice in the Federal Courts.

The Court of Appeals erred in reviewing this record under Rule 52(a) of the Federal Rules of Civil Procedure.

Rule 52(a) specifically required the Court of Appeals to give "due regard * * * to the opportunity of the trial court to judge of the credibility of witnesses."[9] The Court of Appeals could not give "due regard" to an opportunity which the record shows the Trial Court did not exercise.

Moreover, the great weight which Rule 52(a) accords to the Trial Court's findings surely presupposes that such findings were made and entered by a trial judge whose judicial conduct is beyond question. Where such conduct has been directly questioned and left unresolved by the Trial Judge so that the appellate court must resort to a legal presumption to strike the balance in his favor, Rule 52(a) can have no application. The Court of Appeals' opinion to the contrary presents a question of substantial importance, not only to the par-

9. Rule 52(a) Fed. R. Civ. P. is set forth verbatim at page 47, infra.

ties, but to the sound administration of justice in our Federal Courts. The correctness and consequences of such a rule should be carefully examined by this Court.

CONCLUSION

Nothing is more fundamental to our judicial system than the requirement that all legal proceedings be conducted with utmost fairness and impartiality,—free, to use the words of the Canons of Judicial Ethics, "from impropriety and the appearance of impropriety." Only strict observance of this requirement can justify the general acceptance which our courts have earned as agreeable forums for the resolution of disputes. Where this fundamental principle has been watered down and compromised, as the record discloses has been done by the courts below, this Court has a manifest obligation to reverse the tide and instruct its subordinate tribunals that questions of justice can neither be resolved by applying sterile legal presumptions and left in doubt, nor can a judgment contaminated by such uncertainty be approved as the unimpeachable product of a fair and impartial trial. Accordingly, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

William J. WINEBERG, Plaintiff,

v.

Mary K. MOORE et al., Defendants.

No. 34863.

United States District Court
N. D. California, S. D.
April 29, 1961.

As Amended June 22, 1961.

OLIVER J. CARTER, District Judge.

This is an action by William J. Wineberg, a citizen of Washington, for quiet title and other relief upon 880 acres of timber land in Humboldt County, located in northern California. The amount in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and is between citizens of different states; therefore, jurisdiction is established on the basis of diversity of citizenship as provided by Title 28 U.S.C. § 1332. The real property and transactions critical to the disposition of this matter occurred in California, and it is deemed that California law is controlling. See Erie R. R. Co. v. Tompkins, 304 U.S. 64,58 S.Ct. 817, 82 L.Ed. 1188.

Wineberg alleges that he purchased the property from O. O. Barker in May, 1948, for $6,000, but he failed to record his deed in Humboldt County until May, 1951. In the interim Barker, the seller, made a contract for the sale of the timber on the land to the defendant, Construction Engineers, which contract was recorded in 1950; in 1951 Barker sold the property again, deeding it this time to the defendant, Natural Resources, Inc., and this deed was also recorded before the Wineberg deed. Throughout this period, several judgments were obtained against O. O. Barker, and some of these judgment creditors are also defendants.

At the outset, this Court must resolve the difficult factual question of whether or not Wineberg ever ac-

tually purchased the property from Barker. It is urged that the $6,000 advanced to Barker was intended as a loan, with the deed given to Wineberg serving only as security for the loan.

The evidence shows that prior to May 22, 1948, the date on which Barker delivered the deed to Wineberg in Portland, Oregon, that Wineberg was negotiating with an Oregon firm, the Weinert Lumber Co., for the sale of some timber owned by Wineberg in Oregon. Wineberg's testimony indicated that, contemplating both the purchase of the California property from Barker, and also the sale of his Oregon timber to the Weinert Lumber Co., he wanted to unite both transactions into a like-for-like trade and thus avoid payment of taxes on the gain realized upon the sale of the Oregon timber. Before this proposed transaction was consummated, however, Barker came to Portland on May 22, 1948, delivered the deed granting the property from him directly to Wineberg, and received Wineberg's check for $6,000. It appears that Wineberg at that time wrote this notation on the check:

"In full, 880 acres, Humboldt Co. Calif."

However, lines have been drawn through this notation so as to partially obliterate it, and the superimposed word "Loan" was written over it. Wineberg's check stub for this check has the word "Loan" entered thereon, and his books show that on that day he made a loan to Barker of $6,000. Three days later, Wineberg executed a bill of sale to Weinert Lumber Co. for his Oregon timber, and this document recites that the timber is transferred to Weinert Lumber Co. in trade for timber located in California. Two days later, on May 27, 1948, this unusual transaction occurred: Barker returned to Portland, and Wineberg delivered to him a second check for $6,000 from Weinert Lumber Co. and naming Barker as payee. Weinert Lumber Co. treated its check to Barker, to whom it was a stranger, as payment to Wineberg for the Oregon timber he transferred to Weinert Lumber Co., and Wineberg entered the $6,000

check from Barker to him as payment of the loan for the same amount he had made to Barker five days previously.

The defendants, seeking to defeat Wineberg's claim of absolute ownership in the property, insist that these loan indications, entered by Wineberg's own hand, show that Wineberg actually loaned Barker $6,000, and that therefore he only acquired a security interest in the land. As Barker still wound up with $6,000, no part of which was ever returned to Wineberg, this would negate the idea that the parties intended a loan instead of a sale. Paradoxically, Barker himself is of little assistance. For seven years and up to the time of trial, he had assumed that he had sold the land to Wineberg, even endeavoring to straighten out Wineberg's title for him when he complained that some of the defendants were removing timber from the land. At the trial, Barker's best recollection was that this was a loan transaction.

The question to be ascertained is whether or not the parties intended this deed to be a security device, or to convey an absolute estate as the deed purported to do. See Greene v. Colburn, 160 Cal.App.2d 355, 325 P.2d 148. The deed from Barker to Wineberg purported to convey a fee simple absolute, but "a deed absolute on its face may in equity be shown by parole evidence to have been intended as security for a debt, and hence only a mortgage." Anglo-Californian Bank v. Cerf, 147 Cal. 384, 388, 81 P. 1077; see also § 2925 Civil Code of California; Sherman v. Panno, 129 Cal.App.2d 375, 277 P.2d 80; Beeler v. American Trust Co., 24 Cal.2d 1, 147 P.2d 583. In the Sherman case, cited supra, the court stated at page 388 of 129 Cal.App.2d, at page 88 of 277 P.2d, that:

> "* * * in order to determine the true character of the transaction, the trial court should consider all the facts and circumstances surrounding the transaction, including the conduct of the parties before and after."

A deed purporting to convey all interests that a gran-

tor possesses is presumed to do just that, and not to create a mere security interest. See Gronenschild v. Ritzenthaler, 81 Cal.App.2d 138, 183 P.2d 720. The establishment of a deed absolute as a security device requires clear and convincing proof. Mahoney v. Bostwick, 96 Cal. 53, 30 P. 1020; Kohn v. Parent, 174 Cal. 570, 163 P. 1008. Furthermore, this burden of proof rests with the party attempting to alter the plain terms of the deed. Woods v. Jensen, 130 Cal. 200, 62 P. 473.

The circumstances surrounding the deed from Barker to Wineberg is not without doubt as to the true intent of the parties in respect to the interest created, but this Court is not persuaded that this transaction was merely a security device to secure a loan to Barker. And since the evidence of a loan was not clear and convincing, it follows that this deed must stand as a conveyance of the fee simple absolute.

This Court must now ascertain whether or not failure to record by Wineberg makes his legal title subject to the prior recordings by Construction Engineers and Natural Resources, Inc., or whether these defendants were put on notice by conduct of Wineberg so as to preclude a subsequent good faith purchase of any interest in the property by said defendants.

Construction Engineers seeks to defeat Wineberg's right to the timber on the property by virtue of its 1950 contract with Barker for the sale of the timber on the land, which contract was recorded prior to the time that Wineberg recorded his deed. All other defendants who actively participated in the trial and who filed briefs seek to defeat Wineberg's title on the additional ground of Barker's 1951 deed of this property to Natural Resources, Inc., said deed being recorded subsequent to the timber contract of Construction Engineers, but before the deed to Wineberg. Wineberg's superiority of title as against all defendants named rests upon the outcome of the issues between Wineberg, Construction Engineers, and Natural Resources, Inc., respectively, since there is no other assertion of a superior title being made.

It must first be established that the timber contract of Construction Engineers was such an interest as to be within the scope of the recording statute. The pertinent section is § 1214 of the California Civil Code which provides:

> "Every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action."

Section 27280 of the California Government Code provides:

> "Any instrument or judgment affecting the title to or possession of real property may be recorded pursuant to this chapter."

In Kirsch v. Barnes, D.C.N.D.Cal.1957, 157 F.Supp. 671, 673, affirmed 9 Cir., 263 F.2d 692, the court stated:

> "Furthermore, it has been specifically held that the recordation of a contract involving the right to remove timber within a specified period of time is not only proper, but will serve to constitute constructive notice to subsequent purchasers."

And in 1957 the State of California added section 1220 to the California Civil Code, which provided for recordation of instruments affecting growing timber, and section 1220 adopted the provisions of the recording statutes which related to conveyances of land thus including the tenor of section 1214. It is true that section 1220 does not specifically apply here because the transactions in this case antedated its enactment, but the section did include the following paragraph before it was deleted by amendment in 1959:

> "In enacting this section, it is the intent of the

Legislature to remove any possible ambiguity which may exist in the present law relating to the recordation of certain documents and to codify the existing law without change or addition, thus recognizing specifically by statute the unvarying practice of county recorders for many years." See Statutes 1957, c. 1937, p. 3467, § 1.

This statement by the Legislature does not establish that a timber contract was a recordable document prior to the 1957 amendment, but it does negate an argument that the Legislature intended to change the law by this enactment. This statement at least establishes that the Legislature considered such an interest recordable, but thought that a legislative expression was necessary to prevent further argument. This Court is persuaded that the timber contract in question was a recordable document, and, as such, if the vendee was without notice at the time of purchase and recordation of any outstanding equities, his claim would be superior to that of Wineberg.

The critical factual question for resolution is whether or not Wineberg's possession was sufficient to impart notice to Construction Engineers, Inc. and Natural Resources, Inc. which would prevent them from establishing a superior right pursuant to Section 1214 of the Civil Code of California (quoted supra).

The common law rule was that once a grantor conveyed all his interest in a parcel of real property he could create no further rights in the property in a third person absent any elements of estoppel. The recording statutes have altered this rule for it is now possible for a grantor to make a second conveyance divesting the first grantee so long as the second grantee pays a valuable consideration, records first, and is in good faith. The California recording statute requires the second purchaser to be without notice, actual or constructive, of the interest of the prior purchaser. A deed that is not recorded is nevertheless valid between the parties thereto, and persons who have notice thereof. § 1217 Civil

Code of California. Section 18 of the Civil Code of the State of California defines notice as follows:

> "1. Actual—which consists in express information of a fact; or, 2. Constructive—which is imputed by law."

Section 1107 of the Civil Code of the State of California provides:

> "Every grant of an estate in real property is conclusive against the grantor, also against every one subsequently claiming under him, except a purchaser or incumbrancer who in good faith and for a valuable consideration acquires a title or lien by an instrument that is first duly recorded."

A party purchasing real property from a title holder of record where a third person is in possession is presumed to purchase "with full notice of all the legal and equitable rights in the premises of such party in possession and in subordination to these rights, and this presumption is only to be overcome or rebutted by clear and explicit proof on the part of such purchaser, or those claiming under him, of diligent, unavailing effort by the vendee to discover or obtain actual notice of any legal or equitable rights in behalf of the party in possession." Pell v. McElroy, 36 Cal. 268, 271. It is incumbent upon a subsequent purchaser to ascertain who is in possession. Scheerer v. Cuddy, 85 Cal. 270, 271, 24 P. 713. In absence of actual inquiry a person is still chargeable with the notice imparted by possession—such notice is akin to, if not equivalent to constructive notice.

California Civil Code § 19 provides:

> "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

In Pacific Gas & Electric Co. v. Minnette, 1953, 115 Cal.App.2d 698, 705, 252 P.2d 642, 646, the court applies the following rule:

" 'Possession of land is notice to the world of every right that the possessor has therein, legal or equitable; it is a fact putting all persons on inquiry as to the nature of the occupant's claims.' (39 Am. Jur. 242.)"

The same court approvingly quoted from 66 C.J.S., Notice § 11, pp. 646, 647, as follows:

" 'The presumption is that inquiry of the possessor will disclose how and under what right he holds possession, and, in the absence of such inquiry, the presumption is that, had such inquiry been made, the right, title, or interest under which the possessor held would have been discovered. The notice which the law presumes has been held to be actual, and not merely constructive, notice. Possession is notice not only of whatever title the occupant has but also of whatever right he may have in the property, and the knowledge chargeable to a person after he is put on inquiry by possession of land is not limited to such knowledge as would be gained by examination of the public records.' * * *. The foregoing rules are applied by California courts." 115 Cal.App.2d 705-706, 252 P.2d 646.

Thompson in his treatise on real property states that:

"It is held that the law will impute to a purchaser all information which would be conveyed to him by an actual view of the premises." Thompson on Real Property (permanent edition), Vol. 8 § 4464 at page 318.

This "view of the premises" is by actual visit to the property and not by looking at an aerial map of the terrain nor by flying over the property, even if this is customary with some persons who do not conduct themselves in a prudent manner. This approach may be suitable in an inaccessible terrain, but not as here, where the property is readily accessible by automobile.

The possession required to impart notice to a subse-

quent purchaser in California must be "open, notorious, exclusive and visible, and not consistent with the record title." Randall v. Allen, 180 Cal. 298, 303, 180 P. 941. And in Gibbons v. Yosemite Lumber Co., 190 Cal. 168, 172, 211 P. 4, 5, it is further stated:

> "'* * * the acts of dominion must be adapted to the particular land, its condition, locality, and appropriate use.'"

The burden of proof as to what acts of dominion will suffice to establish notice by possession rests with the person claiming such possession. Dreyfus v. Hirt, 82 Cal. 621, 23 P. 193.

The acts of dominion exercised by Wineberg do not present the strongest case possible in his favor, but, nevertheless, in viewing all the acts and circumstances surrounding the timber contract from Barker to Construction Engineers, Inc. and the conveyance from Barker to Natural Resources, Inc., these acts were sufficient to prevent these defendants from claiming that they purchased their respective interests "in good faith".

This 880 acre parcel of real property is primarily suited to logging operations and secondarily as a recreational facility, with the prime attraction consisting of hunting and fishing. At the time Wineberg purchased the property, there was a dwelling suitable for residence or summer recreational activities and a garage. These buildings were also present on the property at the time defendants consummated their respective transactions. A woven wire fence extended along two sides of the property, but it did not encompass the whole 880 acres. The road leading to the property was obstructed by a locked gate. There was a no trespassing sign posted upon the gate with Wineberg's name and Portland, Oregon, address.

Wineberg paid the taxes upon the property. He visited the property occasionally for recreational purposes, and friends of Wineberg's also utilized the property for like purposes. The occupancy by Wineberg's guests is

deemed that of Wineberg for the purpose of establishing possession, for if an inspection of this property had been made such persons would have identified Wineberg as owner. Further indicia of ownership was present in the form of personal property located in the residence structure identifiable as Wineberg's. There were several no trespassing signs in the near vicinity of the dwelling, and along a trail leading to the stream. These signs all identified Wineberg as claiming an interest in the property inasmuch as he was advising all other persons not to trespass.

The fact that the whole of the property was not enclosed does not prevent Wineberg's possessory acts from extending over the whole 880 acre parcel. As stated in Andrus v. Smith, 1901, 133 Cal. 78, 80, 65 P. 320, 321:

> "It has been held that where the property is in some way subjected to the will and control of the claimant, that an inclosure is not always necessary."

And at page 81 of 133 Cal., at page 321 of 65 P. the same court said:

> "And where a party enters, under color of title, and has actual possession of a part of the whole tract, he has constructive possession of the whole."

Another factor that lessens the need for a complete enclosure is that the point of recognized ingress and egress to this property was by a road that led to the dwelling, and the dwelling and surrounding area was posted with Wineberg's no trespassing signs. Anyone inspecting this property would have begun at this location and be made immediately aware of the fact that some third person was exercising rights therein. A prudent person would have made an inquiry as to the rights of this party.

The use of this property from 1948 through 1950 and 1951 (the critical years as to notice) was occasional, but this, nevertheless, was an adaptation of use in accordance with the secondary utility of the parcel;

namely, recreational purposes such as hunting and fishing. This use has particular meaning when considering the fact that timber, although considered a crop, does not ripen in a given year as far as a logger is concerned, nor is there any demand that it be harvested at a particular time, other than restrictions as to access because of weather conditions. It seems wholly unrealistic to say that logging activities would be the only acts that would be sufficient exercise of dominion over this property to put these defendants on notice of Wineberg's title. This Court does not require that kind of showing, which view is consistent with the controlling California decisions.

The recording system is intended to make secure real property transactions and to protect bona fide purchasers for value from secret liens. This does not mean that a subsequent purchaser may close his eyes to everything but the record title. Beach v. Faust, 2 Cal.2d 290, 40 P.2d 822.

The duty of inquiry is made particularly acute under the facts of this case as a result of the relationship of the defendants to Barker. It was contended, but the evidence failed to sustain a joint venture between Barker and defendants. But the negotiations of these defendants with Barker for the respective interests conveyed or attempted to be conveyed was such that prudence dictated diligent examination of the properties under negotiation. For example, Construction Engineers, Inc., negotiated a contract to purchase a considerable amount of timber described merely as that property of record in Humboldt County in Barker's name, which property, in part, was covered by holding agreements, and other defects which clouded his title. Construction Engineers, Inc., had knowledge of these infirmities. This kind of atmosphere dictates caution. This Court does not say that Construction Engineers could not be a bona fide purchaser, but, considering the possessory acts exercised by Wineberg plus the conditions existing at the time this timber contract was negotiated, this Court deems

that Construction Engineers, Inc., did not act "in good faith."

As an example of how other courts have construed the negotiations leading to this contract between Barker and Construction Engineers, Inc., but involving different property and different parties, see Kejr v. Natural Resources, Inc., 166 Cal.App.2d 571, at page 574, 333 P.2d, 93, at page 95, where the court said:

> "It appears that Barker was a licensed real estate broker whose principal business was negotiating sales of timber lands to logging companies. His method of operation was to have owners quitclaim their property to him subject to holding agreements similar to the holding agreement executed between himself and Hopkins. He would then endeavor to sell the timber or the land in large blocks rather than in the smaller units covered by the individual transactions between himself and small owners. When representatives of Construction Engineers, Inc., were negotiating with Barker for the purchase of the timber on the 7,000 acres covered by the contract later executed by Barker, they had before them many of these holding agreements and in many instances used them for the purpose of describing parcels of the lands included in the contract with Barker. It appears also that Barker told them of the existence of the holding agreements and some reference was made in the contract between Construction Engineers, Inc., and Barker to the effect that some of the lands were under holding agreements."

This same condition existed as to Natural Resources with even more force. Natural Resources was dealing with Barker at a time when his private difficulties were enlarged by a pending criminal matter in this Court. They were purchasing many parcels of real property which were allegedly free of outstanding equities. Yet, the rule here was clouded titles and not clear titles, and this fact was known to Natural Resources. This 880 acre parcel was only one of many parcels conveyed. No in-

spection of this property was made when in fact the property was readily accessible. It may be a practice of some purchasers in the Humboldt County area to view the property by airplane, or through the use of aerial maps, but this does not alter the rule that a subsequent purchaser is chargeable with notice of the equities of a possessor whose possession is inconsistent with title of record as in this case.

Under the conditions existing when the defendants negotiated their respective deals with Barker, they were bound to inspect the property. In the absence of such inspection, they are chargeable with all facts such inspection would have revealed, as well as with facts discoverable by inquiry suggested by such inspection. Such inquiry would have revealed Wineberg's fee simple interest. Good faith demanded this inquiry by these defendants.

In view of this holding it is unnecessary to pass on Wineberg's other contentions.

Judgment is awarded to plaintiff on the issue of title. The issue of damages may be set down for hearing upon the request of any of the parties.

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

WILLIAM J. WINEBERG,
Plaintiff,
v.
MARY K. MOORE, et al.,
Defendants.

No. 34863
MEMORANDUM FOR JUDGMENT

The Court has heretofore determined the issue of title by awarding title of the property to plaintiff. See *Wineberg v. Moore,* (D.C.,N.D.Cal., 1961) 194 F.Supp. 12.

The issues now before the Court are set forth in the Pre-Trial Order of December 12, 1961:

Issue 1. What is the extent of plaintiff's damages?

The evidence shows that 5,271,000 board feet of timber was logged off of the property as the result of a trespass of certain defendant who wrongfully converted the timber to their own use. The market value of the timber at the time of the taking was $11.65 per thousand board feet, and plaintiff was damaged in the sum of $61,407.15.

Issue 2. Against which defendants is plaintiff entitled to judgment?

The evidence shows that the defendants, James C. Rodger, Natural Resources, Inc., A. K. Wilson and O. O. Barker wrongfully trespassed on plaintiff's lands and converted the timber and logs therefrom.

Issue 3. What is the measurement of damages as against each of the defendants?

Each of the defendants is jointly and severally liable for all the damages, except that plaintiff must offset against the damages awarded all amounts recovered from any of these defendants, or others, for the conversion of timber or logs from the property.

Issue 4. Against which defendants is the plaintiff entitled to treble damages?

The evidence shows that the plaintiff is not entitled to treble damages. Plaintiff's failure to record his deed was an act of negligence on his part which created a conflict as to the title to the property. This conflict negates any malice or wilfulness on the part of the defendants.

Issue 5. Is plaintiff entitled to interest from the time of conversion?

The evidence shows that plaintiff is entitled to interest from the time of conversion. The amount of the damages was capable of ascertainment. The amount of the timber taken and its market value were within the knowledge of the defendants at the time of the taking.

Issue 6. Is the plaintiff entitled to an accounting herein?

The evidence shows that plaintiff is entitled to an acounting, and plaintiff may have an accounting to the extent an accounting has not already been made by the evidence in this case.

Issue 7. Should this action be dismissed as to the defendant Wilson?

The evidence shows that the action should not be dismissed as to the defendant A. K. Wilson. In this respect Wilson was the central actor in the trespass and resulting conversion. He was acting as the agent of Natural Resources, Inc., but he personally and intentionally directed and planned the trespass. He made the basic decisions and ordered the trespass to continue after the interest of the plaintiff was called to his attention. The Court finds that he was the driving and moving force behind the trespass and without him the trespass would not have occurred. The evidence shows that Rodger would not have moved without the authorization and direction of Wilson. Therefor, Wilson, though acting as an agent, is personally liable for his own tortious conduct.

Issue 8. Is plaintiff estopped from claiming any damages against defendants Wilson and Natural Resources, Inc., and is plaintiff's claim barred by laches in any event?

The evidence shows that plaintiff is not estopped from claiming any damages against defendants Wilson and Natural Resources, Inc., and plaintiff's claim is not barred by laches. While plaintiff was negligent in failing to record his deed, defendants, including Wilson, were aware of his claim of title to the property and deliberately started logging with that knowledge, and continued to log after plaintiff objected. The evidence further shows that plaintiff objected promptly after he discovered that logging was going on on the property. Furthermore, one of the defendants, Rodger, tried to buy the timber from plaintiff through plaintiff's agent, Hilberg, before logging, and to that extent plaintiff was unaware of the intended trespass.

Issue 9. Is plaintiff estopped from claiming any damages against defendant Van Duzen River Lumber Company?

The issue may be inaptly phrased. The issue may not be one of estoppel, but one of liability. The defendant, Van Duzen River Lumber Company, is not liable to plaintiff because as to plaintiff the evidence shows that Van Duzen was a bona fide purchaser for value. Van Duzen, unlike the other defendants, had no notice of plaintiff's claim to title, and plaintiff was negligent in failing to record his deed. Therefore, on either theory Van Duzen is not liable, except to the extent that Van Duzen withheld money from Rodger and Half Inch

Logging Company for logs delivered from the property. The evidence shows that $8,451.50 was withheld from Half Inch and $837.69 from Rodger. These sums should be paid by Van Duzen to plaintiff.

Issue 10. Should defendant James C. Rodger's cross-complaint for slander be dismissed?

The cross-complaint of defendant James C. Rodger for slander should be dismissed.

Judgment is awarded to plaintiff as indicated.

During the trial the Court reserved ruling on evidence and motions. On such reserved questions the Court now rules:

1. The motion to strike the testimony of Raley is denied.

2. The motion to dismiss as to A. K. Wilson is denied.

3. The motion of Natural Resources, Inc., to dismiss is denied.

4. The motion of Van Duzen to strike the testimony of Bower is denied.

Counsel for plaintiff is directed to prepare and present findings, conclusions and a judgment in accordance herewith.

Dated: June 29, 1962.

OLIVER J. CARTER,
United States District Judge

Appendix C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

WILLIAM J. WINEBERG,
Plaintiff,
v.
MARY K. MOORE, et al.,
Defendants.

No. 34863
MEMORANDUM AND ORDER

Before the Court is defendants A. K. Wilson and Natural Resources, Inc. motion for a new trial.

One of the grounds for a new trial is that there is newly discovered evidence which would materially affect the factual issues in the case. The affidavits in support of this portion of the motion indicate that the newly discovered evidence would be given by one Elwood G. Buffum, who testified as a witness for the plaintiff at the trial, and that his testimony would tend to contradict the testimony of the plaintiff as to whether his transaction with Barker was a purchase or loan. The affidavit of A. K. Wilson alleges that he did not discover this information until after the trial, and had no means of discovering it before.

In the situation where the newly discovered evidence comes from a witness who testified at the trial

courts are reluctant to favorably consider the motion, because the subject matter was before the court and the witness was available. In *Foley v. Northern California Power Co.*, 14 C.A. 401, the court said at 409:

> "But this witness was on the stand during the trial and the case was brought clearly within the rule that 'where newly discovered evidence might have been produced with reasonable diligence a new trial will not be granted.' "

In any event the evidence is simply contradictory to testimony which was already contradicted. Under these circumstances the Court will not exercise its discretion in favor of the moving party. See *Cooper v. Kellogg*, 2 C.2d 504.

The motion for a new trial also claims that the decision is contrary to the weight of the evidence, and that the evidence is insufficient to support the decision of the Court, and further that the judgment is contrary to the law. The Court has reviewed the evidence and still thinks it is sufficient to support the judgment, even though there may be some variances as to the time at which Mr. Wineberg paid the taxes on the property. Insofar as the law is concerned it should be noted that the Court's ruling on the law has been reported in 194 F.Supp. 12, and that this decision has been twice qouted favorably by the intermediate appellate court of California in *Saxon v. DuBois*, 209 C.A.2d 713, 719, and

High Fidelity Enterprises, Inc. v. Hull, 210 C.A. 2d 279, 281.

There is also a claim of personal bias on the part of the court in favor of the plaintiff based upon affidavits by Buffam and Wilson that during the trial the judge of the court and the plaintiff were seen together at a racetrack. Assuming the affidavits to be true it is not evidence of bias, and certainly no ground for granting a new trial.

IT IS, THEREFORE, ORDERED that defendants' motion for a new trial be, and the same is hereby denied.

February 24th, 1964.

OLIVER J. CARTER,
United States District Judge

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATURAL RESOURCES, INC. and A. K. WILSON, *Appellants*,
vs.
WILLIAM J. WINEBERG, *Appellee*.
No. 19,367

[August 2, 1965]

Appeal from the United States District Court for the Northern District of California Southern Division

Before: ORR, BARNES, and KOELSCH, Circuit Judges.

KOELSCH, Circuit Judge.

This suit was brought by William J. Wineberg against Natural Resources, Inc., A. K. Wilson, its president, (hereinafter referred to as "the defendants") and several others, to quiet title to real property situated in Humboldt County, California, and to recover damages for removing growing timber.[1] Both Wineberg and Resources claimed as vendees under grant deeds executed to them respectively by one O. O. Barker and wife.[2] The deed to Wineberg antedated those to Resources, but the defendants sought to overcome the effect of this fact by establishing:

1. Jurisdiction of the district court was rested upon diversity of citizenship of the opposing parties under 28 U.S.C. § 1332(a)(1).

2. Such deeds carry with them covenants against prior conveyances or encumbrances by the grantor. Calif. Civ. Code § 1113; Snyder v. Pine Grove Lumber Co., 105 P.2d 369 (Cal. Dist. Ct. of App. 1940).

1. That the deed to Wineberg, although purporting to be an absolute conveyance of the property was in reality a mortgage given to insure repayment of a loan to Barker, and (in the alternative)

2. That Resources was an innocent purchaser of the property from the Barkers.[3]

The district court found for Wineberg and against the defendants. This appeal is by the defendants from the judgment and the order of the court denying their motion for a new trial.

The defenses, being entirely factual, the trial court's main and subsidiary findings are conclusive on this appeal, unless we can fairly conclude they are "clearly erroneous" within the well known definition stated in *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). We are firmly convinced that they are not.

The evidence relating to the purported purchase, when carefully analyzed, clearly portrays an elaborately calculated scheme by Wineberg to "avoid" income tax liability by setting up the transaction to appear as a "like for like" trade within the permissive provisions of 26 U.S.C. § 1031.[4] The methods he employed to carry out the scheme remind us of the profound observation by the poet Scott in Marmion, Introduction to Canto VI, Stanza 17: "Oh, what a tangled web we weave, When first we practice to deceive![5] But, in spite of its complex-

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3. Under the law of the forum state this is an affirmative defense; the burden is on the defendant to prove he purchased the property and paid the purchase price before notice of the real owner's title. 50 Cal. Jur. 2d, Vendor and Purchaser, §§ 377, 378 (1959).

4. So far as necessary to notice here, Section 1031(a) provides "Non-recognition of gain or loss from exchanges solely in kind. No gain or loss shall be recognized if property held for productive use in trade or business or for investment (not including stock in trade or other property held primarily for sale, nor stocks, bonds, notes, choses in action, certificates of trust or beneficial interest, or other securities or evidences of indebtedness or interest) is exchanged solely for property of a like kind to be held for productive use in trade or business or for investment."

5. The district judge, in a written opinion from which we quote, appraised the transaction and its background in these words: "The evidence shows that prior to May 22, 1948, the date on which Barker delivered the deed to Wineberg in Portland, Oregon, that Wineberg was negotiating with an Oregon

ities, the proof is ample that the deed to Wineberg was intended to be and was what it appeared to be—a conveyance in fee simple, and for a valuable consideration.

Although the deed to Wineberg was executed prior to the time Resources "purchased" the property, it was not recorded in the office of the County Recorder until after Resources had recorded its deeds from the Barkers. As a consequence the Wineberg deed, although valid as against the Barkers and those "who ha[d] notice there-

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firm, the Weinert Lumber Co., for the sale of some timber owned by Wineberg in Oregon. Wineberg's testimony indicated that, contemplating both the purchase of the California property from Barker and also the sale of his Oregon timber to the Weinert Lumber Co., he wanted to unite both transactions into a like-for-like trade and thus avoid payment of taxes on the gain realized upon the sale of the Oregon timber. [At this point we interpolate the following explanation: It is clear that Wineberg intended to create this appearance by what would amount to a "three way deal": He would transfer his Oregon timber to Weinert. Weinert would then issue a check for $6,000.00. The check would be payable not to Wineberg but to Barker. Upon receipt of the check Barker would "sell" his California land to Weinert and the latter would then convey it on to Wineberg, thus seemingly making the transaction an exchange between Wineberg and Weinert]. Before this proposed transaction was consummated, however, Barker [being in immediate need of funds and apparently not being able to wait until the check from Weinert was available] came to Portland on May 22, 1948, delivered the deed granting the property from him directly to Wineberg and received Wineberg's check for $6,000.00. It appears that Wineberg at that time wrote this notation on the check:

'In full 880 acres Humboldt Co. Calif.'

However, lines have been drawn through this notation so as to partially obliterate it, and the superimposed word 'Loan' was written over it. Wineberg's check stub for this check has the word 'Loan' entered thereon, and his books show that on that day he made a loan to Barker of $6,000.00. Three days later, Wineberg executed a bill of sale to Weinert Lumber Co. for his Oregon timber, and this document recites that the timber is transferred to Weinert Lumber Co. in trade for timber in California. Two days later, on May 27, 1948, this unusual transaction occurred: Barker returned to Portland, and Wineberg delivered to him a second check for $6,000.00 from Weinert Lumber Co. and naming Barker as payee. Weinert Lumber Co. treated its check to Barker, to whom it was a stranger, as payment to Wineberg for the Oregon timber he transferred to Weinert Lumber Co., and Wineberg entered the $6,000.00 check from Barker to him [i.e., Barker's own check which he made and gave to Wineberg immediately upon receipt of the Weinert check from Wineberg] as payment of the loan for the same amount he had made to Barker five days previously." Wineberg v. Moore, 194 F. Supp. 12, 13-14 (D.C. Cal. 1961).

We are satisfied, as was the trial judge, that the above resume reflects the truth of the matter. The appellant's vigorous attack on the validity of the court's finding upon the issue of payment is premised primarily upon the fact that Wineberg's checkbook showed a balance of less than $6,000.00 when this check to Barker was written. They argue that this proves the bank did not honor the check. However, the check itself shows that it was presented to the bank and on it appears the bank's "paid" cancellation; there was no documentary or oral proof adduced to contradict this notation.

of" [Cal. Civ. Code § 1217] was void if Resources was a subsequent purchaser "in good faith" within the meaning of Cal. Civ. Code § 1214.[6] *Mayhew v. Burke*, 274 Pac. 517 (Cal. 1929).

Wineberg did not contend that Resources had actual knowledge of his earlier deed but rather that Resources had constructive notice of his ownership by reason of his possession.[7]

Since at least 1868, the California courts have held that:

> "'[W]hen a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed to have made the inquiry and ascertained the extent of such prior right or to have been guilty of a degree of negligence equally fatal to his claim to be considered as a bonda fide purchaser.'"

Pell v. McElroy, 36 Cal. 268, 277 (1868). See also, *Davis v. Baugh*, 59 Cal. 568 (1881) and cases in footnote 19 of 50 Cal. Jur.2d § 369, p. 471. Nor will a purchaser be heard to deny his duty to make a reasonable on-site inspection of the property to ascertain facts leading to inquiry. *Pell v. McElroy*, *supra*, at 271. Thus "[i]t is . . . well settled that where a person who is a stranger to the record title is in possession, the purchaser is under a

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6. Section 1214.

"Every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded . . ."

7. This succinct statement of the rule applicable here and the reason underlying it is set out in 19 Am.Jur. Estoppel, Section 118, page 775:

"'Where a party is found in possession of real property without any title of record, good faith and common prudence require a purchaser to inquire under what title he holds, and if he fails to so do, and purchases, he takes title subject to the equities of the parties in posession. But if the legal title and possession unite in the same person, there is no necessity for inquiry, as the purchaser may well presume the possession to be based on the legal title.' Generally speaking, a person in possession of land is not held to be guilty of laches or negligent delay of such a nature as to estop him to assert his rights, as against successors of one who had a title of record."

duty to make inquiry of such stranger's rights, and failure to do so deprives him of the status of a bona fide purchaser." *Manig v. Bachman*, 273 P.2d 596, 600 (Cal. Dist. Ct. of App. 1954).

> "'Possession is notice not only of whatever title the occupant has but also of whatever right he may have in the property, *and the knowledge chargeable to a person after he is put on inquiry by possession of land is not limited to such knowledge as would be gained by examination of the public records.*'"

Pacific Gas & Electric Co. v. Minnette, 252 P.2d 642, 646 (Cal. Dist. Ct. App. 1953). In short, possession requires a reasonably diligent inquiry into the nature of the right asserted by one in possession and charges the purchaser with knowledge of whatever facts such an inquiry would reveal.

The ultimate question of fact for the district court as fact finder was therefore whether Wineberg's possession of the property was such as to impart notice of his interest to Resources. On this issue too we are satisfied with that court's finding in favor of Wineberg.

The property consisted of an 880 acre tract of timberland situated in a remote section of northern California. Aside from fences, the improvements consisted of a house and several sheds near the south boundary of the property. The principal, if not the only access, was by a road extending from the main highway several miles distant through adjoining privately owned land and ending at a gate near the above mentioned buildings.

There was considerable evidence to the effect that during all times when Resources was negotiating with the Barkers the property was posted with a number of printed signs. These signs, one of which was admitted into evidence as an exhibit, set forth in large printed letters the name and address of Wineberg, together with a "no trespass" warning. Some of the signs were prominently posted along the road and at the gate lead-

ing to the property; others were nailed to the house and a nearby tree; still others appeared at points along the river and near the hunting trails leading through the property.

Such signs clearly constitute a recognized means of asserting a possessory claim to property. *Kunze v. Rosenzweig*, 174 N.Y.S. 664 (App. Div. 1919); *Hatch v. Bigelow*, 39 Ill. 546 (1864); see also, *Nolan v. Grant*, 51 Iowa 519, 1 N.W. 709 (1879). Resources would surely have seen one or some of them if it had conducted a reasonable examination of the premises.

Whether Wineberg was estopped because of the delay in recording his deed, to assert title against Resources, likewise involved the issues of Wineberg's possession and Resources' constructive notice.

> "It has been the rule in [California] since the case of Boggs v. Merced Mining Co., 14 Cal. 279, that in order to bring about an estoppel against assertion of ownership of real property, four conditions against the owner of real property are necessary:
>
> 1. that the party to be estopped was apprised of the true state of his own title;
>
> 2. that he made the omission with intent to deceive or with such culpable negligence as to amount to constructive fraud;
>
> 3. that the other party was not only destitute of knowledge of the state of the title, but also of the means of acquiring knowledge; and
>
> 4. that he relied on the admission to his damage."

Taliaferro v. Colasso, 294 P.2d 774, 778 (Cal. Dist. Ct. of App. 1956).

The district court's supported determination of the notice issue, adverse to Resources, is fatal to its claim based upon an estoppel.

The defendant Wilson additionally attacks the validity of the judgment so far as it makes him jointly liable with Resources for the value of all timber removed from the property by Resources and its vendees. He points out that he, in directing the logging operations and making sales, did not act for himself but rather acted for Resources, in the honest belief that Resources was the owner.

Section 2343 of the California Civil Code recognizes the common law that,

> "One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency in any of the following cases, and in no others:
>
> 1. . . .
>
> 2. . . .
>
> 3. When his acts are wrongful in nature."

James v. Marinship Corporation, 155 P.2d 329, 341 (Cal. 1944).

That rule is applicable here. The particular acts, constituting as they did the exercise of dominion over the property, were not authorized by the true owner. They were wrongful even though Wilson committed them in the honest belief that Resources was owner. RESTATEMENT, TORTS § 164 (1934); 1 MECHEM, AGENCY § 1456 (2d ed. 1914). The contractual relationship between Wilson and Resources made no difference. RESTATEMENT, AGENCY 2d, §§ 343-344 (1958). It is elementary that a person is personally responsible for his own torts.

Defendant's motion for new trial was based upon several grounds:

(A) Newly discovered evidence.

At the trial Wineberg testified that he purchased the property outright from the Barkers and denied that

their deed to him was given as security for a loan. In support of their motion, defendants submitted the affidavit of one Elwood G. Buffum, wherein the affiant stated that he was present at a conference with Wineberg and his lawyer preparatory to trial; that Wineberg there stated he had taken the deed as security and that, after Barker failed to repay the loan he, Wineberg, elected to treat the instrumnt as a conveyance and recorded it as such.

Defendants were not entitled to a new trial as of right: the decision, whether to grant or deny them one was a matter within the discretion of the district court. True, Buffum's statements, bearing as they do directly upon the central issue in the case, would go beyond mere impeachment, but in view of the considerable evidence in the record, evidence touching upon this same subject, the court was acting well within that discretion in rejecting the motion on this ground. *Bateman v. Donovan*, 131 F.2d 759 (9th Cir. 1943).

(B) Misconduct of the trial judge.

The basis for this charge apears in a further affidavit of Buffum. He states that, during a recess in the trial, he went to the horse races with Wineberg's lawyer and several other men. That there, Wineberg's attorney noticed and pointed out to him the trial judge and Wineberg; that the two were seated together and engaged in conversation and that this continued for the balance of the afternoon.

We fully recognize the gravity of this indictment and the delicate task we face in its resolution. A judge, like Caesar's wife, must not only be free of any actual wrongdoing, but his conduct whether in or out of the courtroom must be above suspicion. Canon 33 of the Canons of Judicial Ethics bears constant repetition.

> "[A judge] should . . . in pending or prospective litigation before him, be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or

friendships constitute an element in influencing his judicial conduct."

If Buffum's statements were uncontradicted, we would be inclined to order a new trial. However, Wineberg's attorney filed a counter-affidavit, in which he categorically denied each charge. He flatly declared that he never attended any race at any place or at any time with Buffum; with equal vigor he affirmatively asserted that on ocasion he went to a race with Wineberg at which he observed the trial judge "at a distance" but that neither he nor Wineberg sat with or talked to him.[9]

In this state of the record and, after much careful consideration, we think that the balance must be struck in favor of the trial judge.

(C) The final ground of defendant's motion is difficult to catalogue, but it reveals a shocking situation:

The district judge's failure to render a decision upon the issue of Wineberg's title—the central issue which was segregated and tried first—for more than four years after that matter was heard and submitted.

Some cases, of course, require more time than others to decide. But this was clearly not one of them. The law was relatively simple; the trial was not protracted, and the decision should have been announced promptly. Courts must act with diligence to dispose of pending litigation, if they are to merit public confidence and overcome the age old stigma cast upon them by "the law's delay."[10] The lack of diligence here presented is indeed regrettable.

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9. On new trial Wineberg would probably have to secure other or additional counsel if he wished to adduce these statements as testimony, for Canon 19 of the Canons of Professional Ethics contain the admonition that lawyers must leave the trial of cases to other counsel whenever they are called to give other than formal testimony.

10. Counsel frankly state that they have been unable to discover any cases involving the precise point under consideration. They acknowledge that none of the cases they cite [Markakis v. Liberian S/S The Mparmpa Christos, 161 F.Supp. 487 (D.C. N.Y. 1958); Quintin v. Sprague Steamship Co., 252 F.2d 812 (2d Cir. 1958); Hellenic Lines v. The Exmouth, 253 F.2d 473 (2d Cir. 1958)] do any more than criticize judicial dilatoriness. Our own research has only produced additional cases to that same effect.

Defendants of course are not able to point to any actual prejudice because of the district judge's inexcusable inattention to this matter, but they urge the delay is "inherently prejudicial." The argument has considerable surface plausibility, for the fact cannot be denied that memory tends to dim, recollection to grow faint, and impressions to vanish, with the passage of time.

Because this assignment calls into question the integrity of the district court, we have considered the assignment as a matter coming under our primary supervisory jurisdiction, rather than simply as a ruling of a trial court governed by the "abuse of discretion" limitation upon review. And, in that capacity, we have made a critical survey of the whole record, including a painstaking analysis of the entire reporter's transcript. This study reveals that the trial was conducted with extreme fairness to defendants—indeed, they make no complaint of any trial error by the district court—and that there was little real conflict in the evidence. It further shows that the findings on material issues are supported in most particulars by the testimony of disinterested witnesses and not solely upon self-serving statements of Wineberg. While we are not prepared to say that under no circumstances would undue delay be unavailable as a ground for new trial, we are satisfied that such a drastic measure is not warranted here.

No reversible error appearing, the judgment is affirmed.

* * *

Judgment—Title and Caption Omitted

APPEAL from the United States District Court for the Northern District of California, Southern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for

the Northern District of California, Southern Division, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered August 2, 1965

Appendix E

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 of any other motion except as provided in Rule 41(b). As amended Jan. 21, 1963, eff. July 1, 1963.

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Appendix F

Canons of Judicial Ethics

"Canon 1.

"The assumption of the office of judge casts upon the incumbent duties in respect to his personal conduct which concern his relation to the state and its inhabitants, the litigants before him, the principles of law, the practitioners of law in his court, and the witnesses, jurors and attendants who aid him in the administration of its functions.

"Canon 4.

"A judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his every day life, should be beyond reproach.

"Canon 33.

"It is not necessary to the proper performance of judicial duty that a judge should live in retirement or seclusion; it is desirable that, so far as reasonable attention to the completion of his work will permit, he continue to mingle in social intercourse, and that he should not discontinue his interest in or appearance at meetings of members of the Bar. He should, however, in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships constitute an element in influencing his judicial conduct.

"Canon 34.

"In every particular his conduct should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of

public clamor, regardless of public praise, and indifferent to private political or partisan influences; he should administer justice according to law, and deal with his appointments as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity."